



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 4, 2004

Mr. Jonathon Needle  
General Counsel  
Houston Firefighters' Relief and Retirement Fund  
4225 Interwood North Parkway  
Houston, Texas 77032-3866

OR2004-0825

Dear Mr. Needle:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195572.

The Houston Firefighters' Relief and Retirement Fund (the "HFRRF") received a request for all information regarding the KREATE Fund and the MD Anderson project. Upon request, the requestor clarified his request regarding "all information" to specify the following information: (1) prospectuses and any other marketing materials for the investments, (2) minutes of HFRRF meetings at which the investments were voted upon, (3) correspondence with or from persons in recommending the investments to HFRRF, and (4) contracts executed by HFRRF to participate in the investments. In a letter dated November 19, 2003, the requestor withdrew his request for information regarding the MD Anderson project. Thus, our ruling only deals with the information regarding the KREATE Fund. You indicate that release of the requested information may implicate the property interests of third parties. Accordingly, you provide documentation showing that you notified the interested third parties, KREATE Fund No.1, Ltd., KREATE Management, L.L.C, and KREATE Investors ("KREATE") of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain

circumstances). We received arguments from the Keystone Group on behalf of KREATE.<sup>1</sup> We also received comments from the requestor. See Gov't Code § 552.304. We have considered all the submitted arguments and reviewed the submitted information.

First, we address KREATE's common-law privacy claims under section 552.101 of the Government Code.<sup>2</sup> Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Upon review, we find that the requested information concerns a company rather than an individual and is therefore not protected by common-law privacy. See generally Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); see also *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (corporation has no right to privacy). Therefore, none of KREATE's information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.110 of the Government Code protects the proprietary interests of third parties by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), cert. denied, 358 U.S. 898 (1958); see also Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business... in that it is not simply information as to single or ephemeral events in the conduct of the

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<sup>1</sup> Keystone Group is the general partner of KREATE Investors and the sole member of KREATE Management.

<sup>2</sup> Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrine of common-law privacy.

business.... A trade secret is a process or device for continuous use in the operation of the business.... [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>3</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. See Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code excepts from disclosure " [c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); see also Open Records Decision No. 661 (1999).

KREATE claims that all of the submitted information is protected under both prongs of section 552.110. Having considered all of KREATE's arguments, we conclude that KREATE has demonstrated that most of the submitted information is excepted from disclosure under section 552.110(b). We have marked the information that HFRRF must withhold. We note that the requestor asserts that KREATE's fourteen page power point presentation was presented at HFRRF's Board of Trustees investment committee meeting. The requestor claims that no executive meeting was called, therefore, the power point presentation is public information. We are unable to determine if this information was in fact presented at an open meeting. If the power point presentation was given at the open meeting,

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<sup>3</sup> The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Restatement of Torts § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

the presentation must be released to the requestor in its entirety. However, if the power point presentation was not submitted at an open meeting, HFRRF must withhold pages 2, 3, 13, and 14 of the submitted power point presentation under section 552.110(b).

KREATE has not shown that any of the remaining information at issue qualifies as a trade secret or that the release of any of that information would be likely to cause it substantial competitive harm. Therefore, none of the remaining information, is excepted from disclosure under either aspect of section 552.110. *See* Gov't Code § 552.110(a),(b); Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

In summary, the information we have marked is excepted from disclosure under section 552.110(b) of the Government Code. Pages 2, 3, 13, and 14 of the power point presentation may also be excepted from disclosure under section 552.110(b) if the information was not submitted at an open meeting. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body

fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Debbie K. Lee  
Assistant Attorney General  
Open Records Division

DKL/seg

Ref: ID# 195572

Enc. Submitted documents

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